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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD SADLOWSKI, *et al.*,
Plaintiffs-Petitioners

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant-Respondent

and

UNITED STEELWORKERS OF AMERICA,
Intervenor-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Edward Sadlowski, et al., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The 2-Judge panel of the Court of Appeals did not hear oral argument or write an opinion; its summary Order of affirmance appears as Appendix A. The Order of the Court of Appeals of January 24, 1980 denying rehearing

appears as Appendix B. The Order of the Court of Appeals the same day denying the suggestion for rehearing *en banc* appears as Appendix C. The opinion of the District Court is reported at 464 F. Supp. 858 (1979) and appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals denying rehearing (Appendix B) was entered on January 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor failed to carry out his duty to make a full, reasonable and proper investigation of the violation-ridden election of top United Steelworkers officers on February 8, 1977; whether the Secretary failed to carry out his duty as lawyer for the complainants challenging that election; and whether his Statement of Reasons for not seeking to upset that election was arbitrary and capricious on its face.

STATUTE INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 482 (LMRDA), provides in pertinent part:

> (a) A member of a labor organization * * * may file a complaint with the Secretary within one calendar month [after he has exhausted his intraunion remedies] alleging the violation of any provision of section 481 of this title * * *.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary * * *.

STATEMENT

This is a suit by plaintiff Edward Sadlowski and the other four members of his election slate against defendant Secretary of Labor to require the Secretary's compliance with and implementation of Title IV of LMDRA in connection with the United Steelworkers' violation-ridden election of top USWA officers on February 8, 1977. Plaintiffs contend that the Secretary failed to make a full, reasonable, and proper investigation of the election violations as required by Title IV of LMRDA, failed to carry out his duty to act as lawyer for plaintiffs, and provided a Statement of Reasons for not seeking to upset the election that was arbitrary and capricious on its face. The District Court granted motions for summary judgment by the Secretary and intervenor USWA without answering any of plaintiffs' contentions, in effect holding that a Statement of Reasons 83 pages long was all that LMRDA required (App. D at 9a, 13a, 16a). A 2-member panel of the Court of Appeals summarily affirmed without oral argument and without giving any reason whatever for the affirmance and the Court thereafter denied rehearing *en banc* or otherwise (App. A, B, C). The Court below, in unexplained and inexplicable silence, has thus nullified both LMRDA's election provisions intended to insure union democracy and this Court's rulings in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972)* and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) implementing those provisions.

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* Like the instant case, *Trbovich* was a petition from an affirmance without opinion.

1. *Background: The Only Hope For Enforcement of the Union Democracy Provisions of LMRDA Lies With The Courts*

"To challenge an entrenched union president . . . [has] long been considered one of the more daring if not foolhardly exercises in union politics." [1] To challenge the entrenched bureaucracy of the Steelworkers Union is the ultimate in such daring and foolhardiness. For the USWA is run by its Official Family (J.A. 3)[2] and, indeed, I. W. Abel, the Union's President at the time of the disputed February 8, 1977 election, testified that the Union's Official Family, consisting of the International Officers and the District Directors, automatically "support each other" against any challenger with financial, legal and other assistance. *Brennan* v. *United Steelworkers of America and Edward Sadlowski*, Civil Action No. 73-0957-B (W.D.Pa.), deposition August 15, 1974, at 6, 7, 11, 12, 13, 15, 16. Mr. Abel also testified that a union member who challenged an incumbent and lost should not appeal to the government under LMRDA "even though there was ballot-box stuffing" (*id.* at 37-38). The Official Family is thus, on the basis of the Union President's own sworn testimony, a private government operating outside the law of the land (J.A. 3).

Mr. Abel's predecessor as President of the USWA and as head of its Official Family, David McDonald, went even farther. Mr. McDonald related his role in personally stealing union elections and, referring to the probability of theft in this very election, stated "that unless Sadlowski would have an overwhelming victory in the United States he will not win the presidency. The Canadian return sheets will carry enough votes in favor of Lloyd McBride [the Official Family candidate] that he will be declared elected" (J.A. 4).

[1] J. Herling, RIGHT TO CHALLENGE 301 (1972).

[2] "J.A." references are to the Joint Appendix in the Court below.

Recent USWA history confirms Mr. McDonald's statements on stolen elections. For example, the 1973 election for Director of District 31 (USWA's largest district), which resulted in the purported defeat of the reform challenger, Edward Sadlowski, was so corrupt that, after a Federal District Court ordered a new election under Labor Department supervision, Sadlowski won by a two-to-one margin over the Official Family candidate (J.A. 4). The overwhelming victory by the reform group in the rerun supervised election indicates how many votes had to be stolen in the first election in order to count out plaintiff Sadlowski.[3]

Added to the Official Family's control of the USWA is the fact that the Labor Department, far from assisting reform challengers in the interest of fair elections and union democracy, has become an obstacle course for those seeking to challenge union incumbents:

> "The struggle by UMWA [Mineworkers] members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the

[3] Determined that there never again be a serious Sadlowski-type challenge to the Official Family as in the 1973 election for the District Director described in the text and the 1977 election for President involved in this case, the Official Family brought suit to prevent foundations from contributing to making a USWA election as fair as possible (*McBride* v. *Rockefeller Family Fund*, No. 79-1177, October Term, 1979) and induced the Internal Revenue Service to attack the tax exemption of the Association for Union Democracy, the only organization working full-time for union democracy. But likely the most blatant Official Family assault on union democracy occurred at the September, 1978, USWA convention. There the USWA Constitution was amended to forbid outsiders (non-members) from contributing to, or supporting as lawyer or otherwise, a candidate for International office. Staff contributions to incumbents, on the one hand, and no outsider support for reform challengers on the other, is patent incumbent *self-perpetuation*. Sadlowski and others have brought suit to have this USWA provision declared unconstitutional. *Sadlowski* v. *United Steelworkers*, C.A. No. 79-2953 (D.D.C.).

officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often, union reformers have found the Department of Labor allied with union incumbents against their interests." Brief for United Mine Workers of America as amicus curiae, p. 3, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

"[O]ver the past 12 years under four administrations the Labor Department has generally been timid and reluctant to give Landrum-Griffin [the popular name for LMRDA] the vigorous implementation and strict enforcement that Congress expected." Former Senator Robert B. Griffin, United Mine Workers' Election, 1971, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971), pt. 2, p. 42.

"The Department's procedures place far greater reliance on the internal union appeals process than on litigation and emphasize promotion of the DOL's conception of the public interest rather than enforcement of individual rights." Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 474 (1972).

"[W]e note that this case [Trusteeships] has consumed more than seven years while three Secretaries of Labor have successively manned the helm . . . the districts involved have endured trusteeships for decades. The case at bar suffers by comparison with other litigation brought by union members to liquidate trusteeships which was concluded successfully in far less time." *Hodgson* v. *United Mine Workers of America*, 473 F. 2d 118, 130 (D.C. Cir. 1972).

". . . the Secretary and the Department have daily dealings with labor on a wide range of issues, only a very small percentage having to do with elections. If the Secretary is to work amicably with the unions on the range of issues, capitulation on title IV enforcement may seem a natural response. All the

systematic and continuous pressure on the Secretary is one-sided, coming from incumbent union officials who have little interest in vigorous title IV enforcement. And the political pressure is at its highest during insurgent election challenges. *This pressure amounts to capture by organized labor of the agency meant to regulate it.*" James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 Harv.Civ.Rights—Civ. Liberties L.Rev. 247, 295 (1978). (Emphasis supplied).

Added to these twin obstacles facing a reform challenger in the USWA—Official Family autocracy and Labor Department indifference or worse—is the especially cozy relationship between the Department and the USWA lawyers.[4] This relationship is well illustrated, for example, by the Department's actions *in this Court* in the case where Sadlowski sought fees for his success in obtaining a supervised re-election in District 31. *United Steelworkers* v. *Sadlowski*, No. 77-643, October Term, 1977. The United States Court of Appeals for the D.C. Circuit (*Usery* v. *Local Union No. 639*, 177 U.S.App.D.C. 222, 543 F.2d 369 (1976)) and the Third Circuit had both held that an intervenor in a successful suit to upset a union election may be awarded attorneys' fees. While USWA's petition for certiorari to review the Third Circuit decision was under consideration by this Court, Solicitor of Labor Clauss reversed the Labor Department's previously neutral position on this issue and wrote USWA counsel Gottesman a letter (unbeknownst to the Solicitor General) supporting the union's position against attorneys' fees which letter was filed with this Court by the USWA counsel. At the time the Clauss letter was originally sent to Gottesman (it was later edited by Gottesman to make it more presentable to this Court and redispatched by Clauss to Gottesman under the

[4] As this Court said in *Hall* v. *Cole*, 412 U.S. 1, 13 (1973), union lawyers are at the "beck and call" of those in charge of the union.

original date), Gottesman was a member of the judicial screening committee considering Clauss' application for a District Judgeship and supported her application. After these facts were made known to the Attorney General by representatives of the Bar Association, Clauss was forced to ask that her nomination to the Bench be withdrawn. Although both Solicitor Clauss and attorney Gottesman have successfully resisted being deposed on these matters, the facts are of record in the Sadlowski fee case on remand. *United Steelworkers of America* v. *Sadlowski*, Civil Action No. 73-957 (W.D.Pa.). This matter becomes doubly relevant because Solicitor Clauss was one of the two Labor Department officials who made the decision not to bring suit herein (J.A. 146) and Mr. Gottesman was the USWA attorney urging that result.[5]

This is the *factual* background against which this case comes to this Court. But there is also the *legislative* background of the Congressional intent in enacting LMRDA. As this Court made clear, Congress was extremely concerned about the danger that union leaders were abusing the powers conferred on them and "saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the regulation of union elections." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 531 (1972). That comprehensive scheme for the regulation of union elections is in danger of nullification by the unions and the Labor Department; only this Court stands in the way of that nullification process.

2. *Proceedings Below*

The complaint lists two kinds of violations of LMRDA —pre-election violations and election-day violations. The

[5] Gottesman's request to Clauss for her help in this Court on the Sadlowski fee case goes back at least to November 9, 1977. Clauss' decision not to sue is dated November 11, 1977.

former included massive violations in obtaining nominations for the Official Family slate to create a bandwagon effect (J.A. 6-8);[6] 800 USWA staff representatives campaigning on union time for the Official Family slate (J.A. 8); forced financing of the Official Family's campaign by these staff representatives and other USWA employees (J.A. 9); denial of Sadlowski observers (J.A. 11-13); violence against Sadlowski supporters (J.A. 13-14); use of union dues to prepare and mail expensive publications to the members (J.A. 10, 59-60); use of USWA in-house and retained counsel, paid from membership dues, to defend the Official Family slate's interests in conflict with the membership's interests (J.A. 10); and, possibly saddest of all, the use of the great name and reputation of A. Philip Randolph in support of McBride's campaign without Mr. Randolph's knowledge or consent (J.A. 37). These blatant violations of law foreshadowed the equally widespread violations on election day: McBride supporters stuffing ballot boxes; fraudulently reporting more votes than there were union members; fraudulently filing incredible returns in which each member of the Sadlowski slate was given identical votes, as was each member of the McBride slate; fraudulently filing equally incredible returns in which zero or near zero votes for the Sadlowski slate were reported; fraudulently filing returns prior to the completion of voting and counting; failing to provide a secret ballot; campaigning for the McBride slate within the polling area; harassing and obstructing Sadlowski slate observers; preventing, delaying and frustrating elections where favorable results of Sadlowski were anticipated; failing to give proper notice of the election; failing to insure that all eligible voters and only eligible voters could cast a ballot; reporting

[6] One staff representative summed it up this way: "I am under instruction to get the nominations [for the Official Family slate] no matter what I have to do to get them" (J.A. 39).

McBride victories when in fact no elections were held (J.A. 17).

Plaintiffs' complaint contains three counts: (I) that the Secretary failed to make a full, reasonable and proper investigation of the election violations as required by Title IV of LMRDA (J.A. 23-42); (II) that the Secretary failed to carry out his duty as lawyer for the complaining union members (J.A. 43-50); and (III) that the Secretary provided a Statement of Reasons for not seeking to upset the election that was arbitrary and capricious on its face (J.A. 51-61).

Relying upon the Secretary's Statement of Reasons the Secretary of Labor and intervenor USWA filed motions for summary judgment. The District Court granted these motions on February 8, 1979 (App. D). In response to plaintiffs' contention that the investigation was not full, reasonable and proper, the District Court in effect held that it had to take the Secretary's word in his Statement of Reasons that he had made an appropriate investigation (App. D at 12a). In response to plaintiffs' contention that the Secretary had failed in his duty to act as plaintiffs' lawyer, the District Court responded that there was no such duty until *after* the Secretary had instituted suit (App. D at 16a). Finally, to plaintiffs' argument that the Secretary's Statement of Reasons was arbitrary and capricious on its face, the District Court in effect held that anything 83 pages long could not be arbitrary and capricious (App. D at 9a, 13a, 16a); the Court refused even to acknowledge the many individual instances of arbitrariness set forth by plaintiffs (App. D at 4a-18a).

A 2-Judge panel of the Court below affirmed without oral argument or giving any reason for its action. A petition for rehearing and a suggestion for rehearing *en banc* were both denied.

REASONS FOR GRANTING THE WRIT

This Court's rulings in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) ended—or at least were thought to have ended—the Secretary of Labor's arrogation to himself of absolute authority to enforce or not to enforce the union democracy provisions of LMRDA. The judgment of the Court below regresses to the pre-*Trbovich-Bachowski* era and leaves the Secretary wholly free to act or not to act as he in his unlimited discretion deems appropriate.

1. Section 402 of LMRDA requires that, where a member of a labor organization has filed with the Secretary of Labor a proper and timely complaint against the union election, "the Secretary *shall* investigate such complaint." The Secretary wholly failed to carry out the explicit duty thus imposed to make a full, reasonable and proper investigation of the challenged election. One example, the farcical investigation of the Canadian locals (J.A. 23-31), will give the Court the flavor of what went on in the so-called investigation. That investigation was conducted by one Tremblay, *a man in the pay of the Steelworkers* (J.A. 27-28). Tremblay started the proceedings by failing to notify the Sadlowski group that he was investigating the election and holding hearings (J.A. 27). For an investigation of 850 locals in Canada, Tremblay had only one staff assistant; he interviewed only one USWA staff representative and no office employees; he reviewed no local union publication for campaign material; he denied the Sadlowski group summaries of the hearings he held without them and the names of the witnesses who testified there; he refused to hear the proffered testimony of any Sadlowski slate witnesses; his report contained dozens of serious and significant misstatements, misrepresentations, omissions and distortions (J.A. 28-29).

It is impossible to determine even today what the Secretary's position is on this Canadian investigation. The

Statement of Reasons uses studied ambiguity—"Nothing in Mr. Tremblay's Report affects those conclusions" (J.A. 145)[7]—which can mean either he did or he did not rely on the Tremblay investigation. Then the Department changed its position; a month later, on December 12, 1977, the Solicitor of Labor wrote plaintiffs' attorneys that ". . . it must be clear to you that we did not rely on the Canadian report in reaching the decision to close the case" (J.A. 30).[8] In the District Court the Department of Labor returned to its studied ambiguity, threw doubt on its December 12, 1977 letter and appeared to be placing some unspecified degree of reliance on that investigation. In the Court below, instead of making clear once and for all whether the Secretary was or was not relying on the Canadian investigation, the Government compounded the ambiguity of its earlier positions by coming up with the new, meaningless and self-evident proposition that "the report of the Canadian Government . . . did not affect the conclusions of the Department of Labor with respect to the United States portion of the investigation" (Brief 7, 37).[9]

[7] The District Court simply parroted this excerpt from the Statement of Reasons (App. D at 8a) without ever referring to the Department's constantly changing position which had been called to his attention. The Court below, of course, said nothing on this score, or on any other matter.

[8] Notably, Solicitor Clauss wrote this letter at the time she was negotiating with USWA lawyer Gottesman for a letter on the Sadlowski fee case and was about to apply for the judicial post to the panel on which Gottesman sat.

[9] The Government's contention below that the Secretary had no alternative to whatever it was he did or didn't do with the Canadian report (Brief 23-26) is without substance. Once plaintiffs informed the Secretary of Tremblay's conflict of interest (J.A. 27-28), the Secretary could have asked the Canadian Government for a new investigator instead of rejecting with hostility plaintiffs' information concerning Tremblay's conflict of interest. Equally, the Secretary could have adopted a suggestion by plaintiffs, as well as one of the Secretary's investigators, that plaintiffs' witnesses be brought to this country to give evidence which the Union would then have been

One can understand the Government's dilemma in not wanting to answer the question plaintiffs have so long been propounding: Did the Secretary rely on the Canadian investigation or did he not? If he *did* so rely, his decision was predicated on an unlawful investigation by a man in the pay of the Steelworkers carried out under conditions described above. If he *did not* so rely, then the Secretary made no investigation whatever of a substantial part of the election and his action is equally unlawful.[10]

The District Court refused to review the adequacy of the investigation, Canadian or American (App. D at 12a). The 2-Judge affirming panel of this Court gave no reason for its affirmance. If this case is allowed to stand as is, the Secretary's statement that he made an investigation is all that is required to thwart the congressional purpose to insure fair democratic elections.

forced to rebut (J.A. 27). The Government's contention (p. 25) that inferences from the failure of the Union to answer plaintiffs would have been of no use in a suit brought by the Secretary to overturn an election is again without substance. If plaintiffs' witnesses produced a *prima facie* case of massive Canadian election violations, these witnesses could have been put on the stand in court to make the same *prima facie* case which, if unrebutted, would support a judgment for the Secretary.

[10] The United States investigation was hardly much better. The Department investigated for less than six weeks, covered only 16% of the United States locals (J.A. 31) and stopped investigating by the first week of August, 1977 (the decision was not made till November 11, 1977). Since the Secretary's limited investigation reduced the Official Family margin in Sadlowski's case by roughly 40% and in plaintiff Montgomery's case by over 90% (J.A. 24, 33) the Secretary had a duty to go forward with questionnaires (as proposed by Sadlowski) or by investigation of additional local unions. The Government gave no reason whatever why it sat on its hands and did no investigating for *more than 90 days* waiting for the Tremblay report when further United States investigation could clearly have produced an opposite result. The Department's failure to go ahead with questionnaires or investigation of additional local unions during this more than 90-day waiting period constituted an arbitrary and capricious refusal to make a full, reasonable and proper investigation.

2. LMRDA imposed upon the Secretary of Labor the duty to act as the union members' lawyer in efforts to overturn a union election. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972); *Dunlop* v. *Bachowski*, 421 U.S. 560, 570 (1975). Plaintiffs' complaint makes clear that the Department wholly rejected that duty in word and deed (J.A. 43-50). The Department explicitly refused to act in the role imposed by Congress and recognized by this Court. On August 15, 1977, at a meeting to discuss the conduct of the investigation, the following exchange between Sadlowski attorney Rauh and Carl Rolnick, Director of the Department's Labor-Management Standards Enforcement, occurred (J.A. 43):

> "Rauh: Do you think you are acting as lawyer for Sadlowski?
>
> Rolnick: Absolutely not. *It is not my position to act as lawyer for Sadlowski.*"

Further, the Secretary even refused to meet with Sadlowski representatives (J.A. 44), refused to make timely responses to their letters and protests (J.A. 45-47), refused to inform them of the Department's investigative plans or consult or accept assistance thereon, and refused to keep the Sadlowski slate informed about the Department's investigation while they were simultaneously keeping the McBride slate fully aware of its progress (J.A. 48-50). It was particularly damaging to plaintiffs' rights to have the Labor Department consulting with the lawyers for the Official Family and giving them the opportunity to explain away the adverse evidence resulting from the investigation, while at the same time refusing to give the plaintiffs the opportunity to buttress and supplement that evidence and rebut the USWA representations. The Secretary turned his duty to act as the complainants' lawyer on its head.

The Secretary's purported justification for refusing to act as the complaining parties' lawyer is that the plaintiffs cannot "instruct" the Secretary to file suit. Of course not. But this does not derogate from the Secretary's duty, as plaintiffs' lawyer, to give plaintiffs a reasonable degree of cooperation and assistance up to the point of decision on whether to bring suit.

The District Court's conclusion (App. D at 16a)—"only after the Secretary has instituted suit does he . . . become an advocate for the complaining union member"—is equally fallacious. For that, of course, is the exact point where the union member does not need the Secretary because he can intervene in the case himself. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). Furthermore, this time factor is nowhere suggested in this Court's statements on the subject in either *Trbovich* or *Bachowski* and is directly contrary to the statement of the bill's sponsor, Senator John Kennedy—on which this Court relied—that the Secretary of Labor "in effect becomes the union member's lawyer" upon his "appeal to the Secretary . . ." (Legis. Hist. of the LMRDA 1093).[11]

In the Court below the Secretary sought to shrug off this Court's imposition of the duty to act as the union members' lawyer as "a convenient metaphor" (Brief 32). Nothing could more clearly evidence the Department's

[11] This Court also apparently assumed that the Secretary became the complainants' lawyer upon receiving their complaint. In *Bachowski*, the Court reasoned as follows: "Since the Secretary's role as lawyer for the complaining union member does not include the duty to indulge a client's usual prerogative to direct his lawyer to file suit, we may reasonably infer that Congress intended that the Secretary supply the member with a reasoned statement why he determined not to proceed" (421 U.S. at 572). There is a clear presupposition in this language that the Secretary has already become the union member's lawyer by the time he has made his determination not to sue. Since the Court is saying that it is the Secretary's duty as the member's lawyer to give him a Statement of Reasons for not instituting suit, it simply does not make sense to say he is *not* the lawyer *until* he institutes suit.

lack of concern for the enforcement of LMRDA as documented in the Statement (*supra*, pp. 5 to 8). The Secretary's duty to act as complainants' lawyer, propounded both by LMRDA's Congressional sponsor and by this Court, has been unilaterally nullified by the Secretary and will remain unimplemented unless this Court acts.

3. The Secretary's Statement of Reasons for refusing to bring suit to upset the election was arbitrary and capricious *on its face*.[12] Eight examples were particularly relied upon by plaintiffs in the Courts below.

(i) Any Statement of Reasons that fails to make clear whether the Secretary *is* or *is not* relying upon the so-called Canadian investigation, as the present Statement fails to do, is obviously arbitrary and capricious. For, if the Secretary is conceding that there was no proper investigation in Canada upon which he could rely, he has no basis for denying that violations in Canada may have affected the outcome of the election. On the other hand, if the Secretary did rely on the so-called investigation in Canada in his Statement of Reasons, he is knowingly relying upon an investigator in the pay of the Steelworkers and an investigation unworthy of the name. *Deliberate ambiguity* on so vital a point is the height of arbitrariness and capriciousness.

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[12] In *Bachowski*, this Court went beyond arbitrariness on the face of the Statement of Reasons and authorized a trial-type hearing on the Department's actions "where the Secretary's decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act.'" (at 574). It seems clear that the Secretary's failure to make an adequate investigation, his refusal even to cooperate with the Sadlowski slate for whom Congress expected the Secretary to act as lawyer and the improper relationship between Steelworkers' attorney Gottesman and the Solicitor of Labor (one of the deciding officials here) are "clearly defiant" of the purposes of the Act. Since the Statement of Reasons is also clearly arbitrary on its face, a decision on this latter point may not be necessary.

(ii) Concluding that violations could not have affected the outcome of the election on the basis of the McBride results rather than the results in the Montgomery contest (Montgomery, of course, is a plaintiff herein) is not only arbitrary and capricious, but evidences the Secretary's *adversary* stance towards those to whom his duty is to act as lawyer. If the analysis had been based on the Montgomery election, where even the Department's inadequate investigation eliminated *over* 90% of the margin, any additional investigation or the acceptance of plaintiffs' position on any of a score of contentions on the effect of violations would have required an opposite conclusion. The Secretary gave no explanation for this action.

(iii) When violations in 16% of the locals in the United States reduced the McBride margin over Sadlowski by roughly 40% and Montgomery's by over 90% —a rate of violation that applied to the totality of United States locals would result in an overwhelming victory for the Sadlowski slate—it was arbitrary and capricious for the Secretary to rule that United States violations could not have affected the outcome of the election. The Secretary never explained why he made no further investigation in the United States during the 3-month waiting period for the Canadian "investigation" or refused to extrapolate from the violations found.

(iv) The Secretary's Statement of Reasons refuses to follow established judicial precedent in computing the effect of violations on the outcome. For example (J.A. 52), although the Secretary concedes that, when members are denied the right to vote, all their votes must be credited to the victim of the violation, in his Statement of Reasons he arbitrarily refused to credit the victims with all affected votes when the violation is lack of secrecy, fraud, or other inadequate safeguards of the balloting. In the latter instance of lack of secrecy, fraud

or inadequate safeguards of balloting, the Secretary arbitrarily throws out all the votes of the local instead of crediting them to the victim of the violations. The Secretary continues this arbitrary distinction in his Statement of Reasons although it flies in the face of an authoritative judicial decision on this point (*Bachowski* v. *Brennan*, 413 F.Supp. 147 (W.D. Pa. 1976)). There, on remand from this Court, District Judge Dumbauld expressly ruled that LMRDA's secrecy provisions were for the benefit of the challengers (at 150) and the Statement of Reasons was "so irrational as to be arbitrary and capricious" where the Secretary threw out all votes in instances of lack of secrecy and safeguards instead of crediting them to the challenger (at 151).[13]

(v) The Secretary's reasoning that USWA's willful obstruction to the recruitment of Sadlowski observers could not have affected the outcome of the election is a classic Catch 22 situation (J.A. 58, 185). The Secretary argues that the denial of observers is immaterial "if the investigation disclosed that the election was otherwise properly conducted" (*id.*). But how does the Secretary know that the election was otherwise properly conducted when he investigated only a minuscule sample of those locals without Sadlowski observers and found violations in a substantial number of them? The circular thread of the Secretary's reasoning has unsurprisingly produced a fabric of arbitrary and capricious conclusions.[14]

[13] The Court below apparently accepted the Secretary's position on remand in *Bachowski* that secrecy defaults were "merely technical violations" (App. D at 15a). All authority is to the contrary. *Marshall* v. *Steelworkers, Local 12447*, 100 L.R.R.M. 2383 (3d Cir. 1978); *Hodgson* v. *United Mineworkers of America*, 344 F.Supp. 17, 30 (D.D.C. 1972); see *Brennan* v. *Local 3489, United Steelworkers*, 520 F.2d 516 (7th Cir. 1975), *aff'd*, 429 U.S. 305 (1977). The Secretary's position in those cases is wholly at odds with his position here or on remand in *Bachowski*.

[14] The Secretary's reasoning is not only circular, but erroneous. As Chief District Judge Bryant ruled in the *Mineworkers* case, "The failure and refusal of the UMWA to assume any responsibility for providing sufficient information to Yablonski for him to avail himself of the opportunity to cover the polls with observers constitutes a flagrant violation of the Act," which alone "may have affected the outcome of the election." *Hodgson* v. *United Mineworkers of America*, 344 F. Supp. at 27, 31.

(vi) The Secretary found there was violence against Sadlowski supporters by staff representatives and union officials and that this "concerted effort to try to intimidate and abuse those who supported Sadlowski" was widely publicized (J.A. 57-58, 186). Incredibly, he contends that this violence by McBride supporters confirmed by his own inadequate investigation could not have had any effect on the outcome of the election.[15] Running against entrenched incumbents is a lonesome and almost hopeless job at best; fear of violence by incumbents makes it impossible. Yet all the Secretary does is blink—one could hardly find anything more arbitrary and capricious.

(vii) The Secretary likewise blinked at the extensive illegal USWA staff activity on behalf of the McBride slate (J.A. 8-9). The Statement of Reasons concedes plaintiffs' basic charge concerning the campaigning of staff representatives (J.A. 55-56, 157). It states at one point that the "investigation disclosed that staff representatives campaigned actively, and that most of them supported the McBride slate"; and, at another point, in defending AFL-CIO President George Meany's January 15th attack on the Sadlowski campaign, concedes that "the Staff Representatives were well informed about the candidates and were active in the campaign long before Janu-

[15] Here, too, the Secretary's reasoning should be compared with Judge Bryant's decision in the UMWA case holding that even a non-violent discharge from office "served notice of what might be expected on all officers, employees, and members of the defendant union who might have been Yablonski supporters," holding it "the type of violation which very well may have affected the outcome of the election," *Hodgson* v. *United Mineworkers of America*, 344 F.Supp. at 28.

ary 15, 1977" (J.A. 55, 179). Despite these findings, the Secretary argues that, because "distinctions between union time and personal time are difficult to make" and "Staff Representatives for the most part have no set hours," the Secretary cannot find that staff campaigning "may have affected the outcome" of the election (J.A. 55, 157).[16] In effect, the Statement of Reasons arbitrarily and capriciously reads staff violations out of LMRDA and dooms its enforcement in the common case of incumbent domination and use of staff.

(viii) Despite all the violations found by the Secretary in his inadequate investigation—including violations potentially tainting numbers of votes which cannot be precisely ascertained—nowhere in his Statement of Reasons does the Secretary refer to the shift to the USWA of the burden of proof to demonstrate that these violations could not have affected the outcome of the election. This not only evidences once again the Department's lack of concern for the enforcement of LMRDA, but equally evidences its casual attitude towards this Court's decisions.

If a violation of Section 401 of LMRDA is established, it must be presumed that the violation "may have affected" the outcome of an election, unless it is met by "tangible evidence" demonstrating that the violation did not affect the result. *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 506-07 (1968).

[16] The Court may want to compare the Secretary's enforcement of LMRDA with the enforcement of 2 U.S.C. 441(b) which makes it unlawful for a union to make any expenditure (including providing services) in connection with a federal election. One can picture the Federal Elections Commission and the Attorney General laughing when a union came in and said that their staff representatives' work for a particular federal candidate should not be considered a violation of section 441(b) because "staff representatives for the most part have no set hours." But that is exactly what the Labor Department said here.

After noting that Congress had deliberately lightened the burden of demonstrating the effect of violations, this Court held:

> "the congressional purpose in changing 'affected' to 'may have affected' in order to avoid rendering the proposed 'remedy practically worthless,' [is satisfied] by ascribing to a proved violation of § 401 the effect of establishing a prima facie case that the violation 'may have affected' the outcome."

In support, the Court cited "the reasoning of" *Wirtz* v. *Local Union 410, IUOE*, 366 F.2d 438, 443 (2d Cir. 1966), regarding circumstances where "proof relating to effect on outcome must necessarily be speculative"; and went on to hold that the District Court had incorrectly concluded that the evidence in rebuttal met the case, because the considerations it relied on were merely "conjecture," not "tangible evidence against the reasonable possibility" that the violations affected the outcome (391 U.S. at 508-09).

The District Court simply refused to review plaintiffs' complaints of arbitrariness.[17] The Court apparently decided that 83 pages of anything could not be arbitrary and capricious (App. D 9a, 13a, 16a) and refused to respond to plaintiffs' arguments. The Court below, of course, affirmed without oral argument or opinion despite the fact that this dereliction by the District Court was repeatedly pointed out to it. If this case is allowed to stand as is, judicial review of the Statement of Reasons becomes a mockery.

4. The unexplained order of the Court below flies in the face of this Court's ruling in *Bachowski*. For years

[17] As indicated in the text, plaintiffs set forth 8 examples of arbitrariness in the Secretary's Statement of Reasons. Seven of these specific examples (i, ii, iii, v, vi, vii, viii), the District Court did not mention at all in his opinion. With respect to the single example he mentioned at all (iv), the Court simply repeated the Secretary's explanation (App. D at 14a-15a). The Court below, of course, mentioned none of the 8.

the Labor Department had contended that its decision not to bring suit to upset an election was so much a matter of its own internal discretion that it did not even have to inform the challenging group of its reasons for not suing and that the courts had no authority to review the Secretary's actions no matter how arbitrary or capricious or otherwise unlawful. This Court in *Bachowski* rejected the Secretary's thesis that he had unlimited discretion to act in any way he wished and confirmed the power of judicial review to require the Secretary to further LMRDA's purpose of insuring fair elections in the interest of union democracy.

The 2-Judge panel order means that the Secretary is free to make whatever investigation he sees fit, no matter how inadequate. The 2-Judge panel order means that the Secretary's duty to act as the complaining members' lawyer can be turned upside down into hostile treatment of the complaining members. The 2-Judge panel order means the end of scrutiny of the Secretary's Statement of Reasons. The union democracy movement might as well have lost *Bachowski* as to have the Court below silently nullify it.

5. Congress has endowed labor unions with extraordinary authority. It has made unions the exclusive representative of the employees for whom they bargain whether the employee desires such representation or not. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332 (1944). It has authorized unions to enter into collective bargaining agreements under which employees must pay dues to the union whether the employee desires to make such payments or not. *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734 (1963). Having granted such government-like authority to labor unions, Congress had the obligation to provide that the officers of those labor unions be fairly elected (cf. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944)) and it was precisely that that the Congress sought to do in Title IV of LMRDA.

In 1959 Congress set up a wholly new procedure in LMRDA to make certain that the election of the union officers who would exercise this extraordinary authority would be fair. It took away the right of the individual complainant to sue to upset an unfair election and in place of that right made the Secretary the lawyer for the complaining party. Far from carrying out this Congressional intent, the Department of Labor has for two decades evidenced a very real disdain for the enforcement of LMRDA (see pp. 5 to 8, *supra*), as this Court itself well knows from the Secretary's unsuccessful submissions here in *Trbovich* and *Bachowski*. After all this, for the courts to look the other way now when the Secretary makes an inadequate investigation, treats the complaining party with hostility instead of acting as his lawyer, and fails to give adequate reasons for refusing to sue is to construe the statute in a way that raises serious issues of due process and turns the Congressional intent for fair elections on its head. The Labor Department having failed to act, as intended by Congress, in the interest of fair elections in unions given government-like powers, this Court has the duty to act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action 78-0250

[Filed Nov. 30, 1979]

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: WRIGHT*, *Chief Judge*, TAMM and WILKEY, *Circuit Judges*

ORDER

On consideration of appellee's (United Steelworkers of America) motion for summary affirmance and of the responses filed with respect thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed.

Per Curiam

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* Chief Judge Wright did not participate in this order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action 78-0250

[Filed Jan. 24, 1980]

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: TAMM and WILKEY, *Circuit Judges*

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 78-0250

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: WRIGHT, *Chief Judge*, MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD and MIKVA, *Circuit Judges*

ORDER

Appellants' suggestion for rehearing en banc has been circulated to the full Court and no judge in regular active service has requested a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court, en banc that appellants' aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Mikva did not participate in the foregoing order.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0250

[Filed Feb. 8, 1979]

EDWARD SADLOWSKI, *et al.*,
Plaintiffs,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*,
Defendant.

MEMORANDUM

This is a complaint for declaratory and injunctive relief brought by plaintiffs, unsuccessful candidates in the February 8, 1977 election for International Officers of the United Steelworkers of America ("USWA"), against the Secretary of Labor for his alleged failure to make a full and complete investigation of the election. The complaint also alleges that the Secretary failed to carry out his duty as lawyer for the complaining union members and that his statement of reasons for not bringing suit demonstrates that the refusal to bring suit to overturn the election was arbitrary and capricious. For the reasons set forth below, the Court concludes that plaintiffs' claims are without merit and grants defendant's and defendant-intervenor's motions for summary judgment.

BACKGROUND

The USWA is the second largest union in the United States with approximately 1.4 million members. It is divided into 25 districts, 22 in the United States and 3 in

Canada, each headed by a District Director who is an International Officer. There are approximately 4,125 local unions, of which 827 are in Canada. The union holds quadrennial elections for International Officers. The actual election is conducted by the local unions acting as agents for the International. The election that is the subject of this lawsuit took place on February 8, 1977.

I. W. Abel, the incumbent International President, had announced that he would retire and would not be a candidate in the 1977 election. An officially endorsed slate of candidates for the five International Offices was announced at the August, 1976 USWA Convention. This slate was headed by Lloyd McBride as candidate for International President.

On September 13, 1976, plaintiff Edward Sadlowski, who served as District Director for the largest USWA district, announced his candidacy for International President. The other members of his slate, all plaintiffs in this action, were Ignacio (NASH) Rodriguez for International Secretary, Andy Kmec for International Treasurer, Marvin Weinstock for Vice President for Administration, and Oliver Montgomery for Vice President for Human Affairs.

In the fall of 1976, the International Union and plaintiff Sadlowski requested the Department of Labor ("DOL") to supervise the International election. This request was refused because Title IV of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA")[1] specifically provides for departmental supervision of a labor organization election only after an election has taken place and a departmental investigation based upon a member's complaint has established that violations of the LMRDA occurred during the election which may have affected the outcome. The Depart-

[1] 29 U.S.C. §§ 481-483 (1976).

ment, however, did agree to provide technical assistance with the conduct of the election.[2]

The election resulted in a victory for McBride, who defeated Sadlowski by 328,861 votes to 249,281, a margin of 79,580 votes. All other members of the McBride slate also were elected, but the victory margin was less for some officers than in the race for International President.[3] On February 18, 1977, Sadlowski filed a timely protest regarding the election with the International Tellers under article V, section 18 of the USWA Constitution. One week later he filed an additional protest, challenging various election procedures and omissions in the tabulation of votes.

The report of the International Tellers, dated April 28, 1977, acknowledged that a timely complaint had been filed and stated that in accord with the USWA Constitution, hearings would be conducted in twenty-five cities in the United States and Canada to hear protests involving election challenges in 367 locals. Sadlowski requested that his attorney be permitted to participate in these hearings, but this request was denied by the International Tellers on the ground that only USWA members could appear and participate in the hearings. After the hearings were held, the Tellers issued a report, denying Sadlowski's protests. The Sadlowski slate appealed this

[2] The assistance included the formation of a task force to issue opinions and answer inquiries about the election, the assignment of compliance officers to each United States district to instruct local union tellers regarding standards of conduct for the election and to advise during the voting process, and the assignment of DOL personnel to total the results of local union election return sheets after they were received by the International Tellers. Statement of Reasons, Exh. 2 to Defendant's Answer to Complaint, at 1-1A [hereinafter cited as Statement of Reason].

[3] The closest race was that for International Vice President for Human Affairs, which was won by the McBride candidate by 52,176 votes. Statement of Reasons, at 3 n.1.

decision to the International Executive Board, which denied their appeal. McBride and his slate were installed in office on June 1, 1977.

Having exhausted internal union remedies, the members of the Sadlowski slate filed a complaint pursuant to section 402(a) of the LMRDA[4] with the DOL, alleging violations of the Act in the conduct of the election. This statute authorizes the Secretary of Labor to conduct an investigation and if this investigation discloses probable cause to believe that there have been violations that may have affected the outcome, the Secretary is authorized to institute suit against the Union to set aside the election and secure a new election conducted under the Secretary's supervision. 29 U.S.C. § 482(b). The LMRDA requires that suits by the Secretary to overturn the results of an election must be initiated no later than sixty days from the filing of a complaint. *Id.* Because of the scope of the complaint, the Secretary obtained a series of waivers from the USWA which extended the deadline for filing suit from August 16, 1977 to November 11, 1977.

Upon receipt of the Sadlowski complaint, the DOL initiated an investigation of the election. Two hundred and fifty investigators, including many who were specially detailed to this project from their normal assignments in other areas, were given special training and made available to work on the complaint. Each compliance officer was expected to work six days a week, ten hours a day. A special post office box was leased and all reports were mailed directly to the Washington office, which was open seven days a week.[5]

The allegations made by Sadlowski in his complaint with respect to the nomination process preceding the election were not investigated because *no timely protests*

[4] 29 U.S.C. § 482(a).

[5] Statement of Reasons, at 5A.

regarding the nomination process were made and the Secretary consequently was precluded from making them the basis of a complaint.[6] The investigation encompassed each of the 301 United States locals named in the complaint as well as an additional 411 local unions investigated on the initiative of the DOL.[7] These locals were selected for investigation on the basis of factors indicating some reason for suspicion, such as lack of election returns, lopsided results, or information gathered in the technical assistance program. Interviews were conducted with 5,422 witnesses.[8]

The complaint also alleged that election violations occurred in the Canadian local unions and districts. The DOL has no authority to investigate in Canada, but the Canadian Minister of Labor convened an industrial board of inquiry to investigate allegations regarding the conduct of the election in Canada. Mr. Roland Tremblay, a former provincial judge and president of the Arbitrators Conference in Quebec and of the Economic Arbitrators of Canada, was appointed to head the inquiry. On October 25, 1977, Commissioner Tremblay issued an Industrial Inquiry Commission Report and forwarded a copy to the DOL. In his statement of reasons the Secretary concluded that nothing in the Canadian report affected the conclusions reached by the United States investigation.

In order to assess the cumulative impact of the violations disclosed by this election, the Secretary utilized the following system for quantifying, in terms of votes po-

[6] *See Hodgson* v. *Local 6799, United Steelworkers of America*, 403 U.S. 333, 336 (1971).

[7] Statement of Reasons, at 6. The 712 locals investigated represented 351,000 members, or approximately 25% of the membership of the International Union. They accounted for approximately 30% of the votes cast in the United States. *Id.*

[8] *Id.*

tentially affected, the significance of each violation found. When members' valid votes had not been tallied, their votes were credited as cast. When members were denied the right to vote, their votes were credited to Sadlowski on the theory that, if given the opportunity, they might have voted for him. When a violation such as inadequate safeguards or lack of secrecy cast doubt upon the validity of the election as a whole, all votes cast were regarded as void. When a violation such as expenditure of union funds or campaigning in the polling place tended to influence voters in favor of one candidate, all votes cast for that candidate that were subject to the improper influence were deducted from his total. When ineligible voters voted or eligible members voted more than once, their votes were deducted from McBride's total. When the violations were such that all votes cast were considered void and the local in addition failed to file an election return, the violations were deemed to have offsetting effects and no changes were made in vote totals.

On November 11, 1977, the Secretary set forth the results of the investigation. He found that there had been no widespread fraud or irregularities as alleged in the United States and that "on the whole, the election was conducted in accordance with the law and with the Union's constitution."[9] The Secretary also concluded that the isolated violations uncovered by the investigation were such as could be expected in any large election and that the violations could not have affected the outcome of the election in the United States.[10] As a result, the Secretary announced his decision not to sue to overturn the election and accompanied his announcement with an 83-page Statement of Reasons explaining the basis for his decision.

[9] *Id.*

[10] *Id.* at 7.

On February 14, 1978, plaintiffs instituted this lawsuit, seeking to compel the Secretary to bring suit to overturn the election. The USWA was granted leave to intervene as a party defendant on July 28, 1978. Presently before the Court are defendant's and defendant-intervenor's motions[11] for summary judgment.

MERITS

The LMRDA regulates various aspects of labor-management relations and internal union affairs in an attempt to assure that "labor organizations . . . and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations . . . ." 29 U.S.C. § 401(a). The special function of Title IV of the Act is to ensure free and democratic union elections and the statute sets out an exclusive enforcement scheme to redress election abuses. *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 470 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

The LMRDA precludes any private action by disappointed office seekers or other union members to contest the results of an election. Section 402 of Title IV sets up an exclusive method for protecting rights under the Act by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election. 29 U.S.C. § 482(a). The Secretary is required to investigate and if he finds probable cause to believe that Title IV has been violated, he may file suit against the union in the appropriate district court to set aside the election and secure a new election conducted under his supervision. *Id.* § 482(b).

[11] Defendant-intervenor also has moved for summary judgment on the ground that the present action was not timely filed or, alternatively, that it is barred by laches. Plaintiffs waited ninety-five days after receiving the Secretary's Statement of Reasons to bring suit, and the USWA asserts that this delay is contrary to the statutory goal of expediting post-election challenges. A recent decision of the United States District Court for the Northern District of Illinois held that a plaintiff was guilty of laches in failing to file suit to challenge the Secretary's statement for two and one-half years. *Larkin* v. *United States Dept. of Labor*, No. 78 C 2362 (Jan. 22, 1979 N.D. Ill.). Because of the Court's disposition of the merits of this action, it does not express an opinion on the question of timeliness.

The LMRDA does not expressly authorize or prohibit judicial review of the Secretary's decision not to bring suit challenging a union election. The Supreme Court, however, has held that limited judicial review of the Secretary's decision is available under the Administrative Procedure Act.[12] *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). The Court defined the permissible scope of review in the following manner:

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election. The full trappings of adversary trial-type hearings would be defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unnecessary interference with their elections."

Id. at 572-73.

[12] *See* 5 U.S.C. §§ 701 *et seq.* (1976).

The Supreme Court in *Bachowski* proceeded to identify some of the "rare cases" that might justify review beyond the confines of the reasons statement. It stated that such review would be proper "if the Secretary were to declare that he could no longer enforce Title IV, or otherwise completely abrogate his enforcement responsibilities . . . [or] if the Secretary prosecuted complaints in a constitutionally discriminatory manner." *Id.* at 574. Other such cases might arise when the Secretary's decision was "plainly beyond the bounds of the Act [or] clearly defiant of the Act." *Id.* (quoting *DeVito* v. *Shultz*, 72 L.R.R.M. 2682, 2682 (D.D.C. 1969).

No court subsequent to *Bachowski* has held that the Secretary's decision not to sue was "plainly beyond the bounds of the Act [or] clearly defiant of the Act." Plaintiffs here argue that the Secretary's alleged failure to make a full, reasonable, and proper investigation of the election is an appropriate subject for expanded judicial review. The Court concludes, however, that the present facts do not represent one of the "rare cases" contemplated by the Supreme Court in *Bachowski*. Consequently, the Court limits its review to the statement of reasons provided in support of the Secretary's decision not to sue.

When a district court determines that the statement of reasons adequately demonstrates that the Secretary's decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed. *See Howard* v. *Hodgson*, 490 F.2d 1194, 1196 (8th Cir. 1974). If, however, the reviewing court finds that the statement of reasons is "so irrational as to constitute the decision arbitrary and capricious," it must remand the decision to the Secretary for a supplemental statement of reasons. 421 U.S. at 574-75. The Supreme Court in *Bachowski* expressly reserved the question whether a court can compel the Secretary to bring suit to overturn

an election, the relief sought here, if the supplemental statement of reasons remains unsatisfactory. *Id.* It intimated, however, that this course might present "some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary." *Id.* (footnote omitted).

The argument for narrow judicial review is supported by the problems posed by a district court attempting to compel the Secretary to bring suit. Such judicial coercion would conflict with the statutory scheme of the LMRDA, in which Congress relied on the "special knowledge and discretion" of the Secretary in making decisions to bring Title IV actions. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Compelling such a suit would raise questions regarding the principles of separation of powers, for the Constitution has vested the power to execute laws with the Executive Branch, not with the federal judiciary. Finally, it would be imprudent for courts to force the Secretary to sue when he is genuinely unwilling to do so because in such situations it is unlikely that the Secretary would pursue the lawsuit vigorously or effectively.[13]

Review of the statement of reasons is governed by the "arbitrary and capricious standard." 421 U.S. at 575. In this case the eighty-three page statement of reasons demonstrates that each of plaintiffs' allegations was carefully investigated as were other possible violations not raised by plaintiffs. The investigative findings were considered and weighed in reaching the conclusion that the violations that had occurred could not have affected the election's outcome.

Such a decision was within the Secretary's statutory discretion, for the Secretary of Labor does not have

[13] *See* Note, *Dunlop* v. *Bachowski and the Limits of Judicial Review Under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 Yale L.J. 885, 900-03 (1977).

an obligation to bring suit to set aside the results of an election whenever he finds a violation of the LMRDA and may refrain from bringing suit if he does not find probable cause to believe that the violation may have effected the outcome of the election. *Howard* v. *Hodgson*, 490 F.2d 1194, 1196 (8th Cir. 1974). This concept is embodied in the DOL regulations [14] and was recognized by the Supreme Court in *Bachowski*:

> [A]s a matter of law . . . the Secretary is not required to sue to set aside the election whenever the proofs before him suggest that the suit might be successful. There remains in him a degree of discretion to select cases and it is his subjective judgment as to the probable outcome of the litigation that must control.

421 U.S. at 572 (quoting *DeVito* v. *Shultz*, 72 L.R.R.M. 2682, 2683 (D.D.C. 1969)).

Only one reviewing court has found the Secretary's statement of reasons "so irrational as to be arbitrary and capricious" and this was the district court in *Bachowski*, in its decision on remand from the Supreme Court and the Third Circuit. *Bachowski* v. *Brennan*, 413 F. Supp. 147, 149 (W.D. Pa.), *appeal dismised*, 545 F.2d 363 (3d Cir. 1976). In calculating the effect of violations on the outcome of the election, the Secretary distinguished between cases in which the number of votes affected could be determined with certainty and those in which it could not. In the former situation the Secretary credited the challenger Bachowski with the whole vote in the voting unit, but in the latter, he eliminated the winner's margin of victory and treated the result as if both candidates had obtained an equal number of votes and the election had never taken place. *Id.* at 149-150. In so doing the Secretary noted that "substantive violations of a type which may affect how a voter votes are to be distinguished from merely technical violations of a procedural character." *Id.* at 150.

[14] 29 C.F.R. § 452.16(b) (1978) states:

> Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they "may have affected the outcome." The Secretary, therefore, will not institute court proceedings upon the basis of a complaint alleging such violations unless he finds probable cause to believe that they "may have affected the outcome of an election."

The United States District Court for the Western District of Pennsylvania held that it was "contrary to the intent of Congress and . . . irrational" to classify as technical those violations affecting the secrecy of a ballot. *Id.* It concluded that the mere fact that the number of voters who failed to vote can be readily counted when no election was held is not rational justification for using the total electorate in that case but using the margin of victory when the right of secrecy has been infringed. *Id.* at 151. The Court ordered the Secretary to conduct a "recount," applying "equal protection" principles. *Id.*

An appeal of this decision to the Third Circuit was dismissed for want of a final order. *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976). The decision has been described as "exceptional" and as "resting on narrow and questionable legal grounds." [15] It appears to this Court that the review undertaken was contrary to the Supreme Court's admonition in *Bachowski*, for despite the Secretary's reasonable explanation of his method of computation, the Court substituted its own judgment for that of the Secretary. Thus, this Court refuses to hold that the Secretary's use of a similar method of computation in this case renders the Secretary's decision not to sue arbitrary and capricious.

An additional ground for relief alleged by plaintiffs in their complaint is that the Secretary failed to carry

[15] Note, *supra* note 13, at 899 n.55.

out his duty as lawyer for the complaining union member. Plaintiffs allege that the defendant did not meet with plaintiffs' counsel and that his representatives did not advise plaintiffs regarding the progress of the investigation or consult with them concerning its conduct.

The concept of the Secretary as the "union member's lawyer" derives from statements made by Senator John Kennedy during floor debates on the bill which was the precursor of Title IV of the LMRDA [16] and has been quoted by the Supreme Court in two decisions.[17] These two opinions define the scope of the Secretary's duty. In conducting an investigation and in deciding whether probable cause exists to institute suit, the Secretary is to serve the public interest and not the interests of any private party. Only after the Secretary has instituted suit does he assume a partisan role and become an advocate for the complaining union member. *See Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972). This stage was never reached in this case. As a result, plaintiffs cannot seek judicial relief based on the Secretary's alleged violation of a nonexistent duty.

CONCLUSION

Plaintiffs oppose defendant's and defendant-intervenor's motions for summary judgment on the ground that there are material issues of fact that preclude such a resolution. After consideration of the applicable legal precedents, however, this Court concludes that its judicial review is limited to the statement of reasons provided by the Secretary in support of his decision not to bring suit. A review of this eighty-three page document and the entire record in this case satisfies the Court that the Sec-

[16] 104 Cong. Rec. 10947 (1958).

[17] *Dunlop* v. *Bachowski*, 421 U.S. at 470; *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972).

retary's decision was not arbitrary and capricious and was within the bounds of his statutory discretion. For the reasons discussed above, the Court grants the motions for summary judgment filed by defendant and defendant-intervenor.

/s/ Oliver Gasch
Judge

Date: Feb. 8, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0250

[Filed Feb. 8, 1979]

EDWARD SADLOWSKI, *et al.*,
Plaintiffs,

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant.

ORDER

Upon consideration of defendant's and defendant-intervenor's motions for summary judgment, the memoranda in support thereof, the opposition thereto, the arguments of counsel, and the entire record in this case, and for the reasons set forth in the Court's memorandum of this date, it is by the Court this 8th day of February, 1979,

ORDERED that defendant's and defendant-intervenor's motions for summary judgment be, and hereby are, granted.

/s/ Oliver Gasch
Judge